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9 and Counterclaimant  
10 STEPHANIE DODSON

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

11 In re: )Case No. 05-32929  
12 )  
13 ALEXANDER N. POPOV, )Chapter 7  
14 Debtor. )  
15 )  
16 YUGEN KAISAH, Y.K.F. )A.P. No. C-08-225-SC  
17 )  
18 STEPHANIE DODSON, )MOTION OF STEPHANIE DODSON FOR  
19 ) (1) ABSTENTION, OR, ALTERNATIVE-  
20 ) LY, (2) FOR A STAY, AND (3) FOR  
21 ) SECURITY FOR COSTS  
22 )  
23 ) Date: April 25, 2008  
24 ) Time: 10:00 a.m.  
25 ) Court: Judge Conti  
26 )  
27 )  
28 )  
YUGEN KAISAH, Y.K.F. )  
vs. )  
Claimant. )  
)

1 COMES NOW defendant and counterclaimant, STEPHANIE DODSON  
2 ("Dodson"), and moves the Court (1) to abstain from hearing this  
3 bankruptcy adversary proceeding for which Bankruptcy Judge Thomas  
4 Carlson has withdrawn the bankruptcy reference, or,

1 alternatively, (2) for an order staying the proceeding because of  
2 plaintiff, YUGEN KAISAH, Y.K.F. ("YKF"), has failed to qualify to  
3 do business in the State of California, although it is doing  
4 business in the State, and (3) to compel YKF to furnish security  
5 for costs (the "Motion").

6 **INTRODUCTION**

7 This Court is sitting as the bankruptcy court in presiding  
8 over this adversary proceeding originally brought by YKF in the  
9 bankruptcy court in San Francisco. On January 7, 2008, Judge  
10 Carlson certified that the reference of the adversary proceeding  
11 to the bankruptcy court was withdrawn in the face of Dodson's  
12 filing of her counterclaim against YKF (the "Counterclaim") on  
13 "which she properly demanded trial by jury," Certification for  
14 Withdrawal of Reference filed January 7, 2008, and in the absence  
15 of Dodson's consent to a jury trial in the bankruptcy court.

16 **CLAIMS**

17 YKF filed its complaint herein (the "Complaint") for an  
18 alleged fraudulent transfer to Dodson by debtor, Alexander Popov  
19 ("Debtor"), of Debtor's interest in certain shares of corporate  
20 stock of Smart Alec's Intelligent Foods, Inc., a California  
21 corporation ("Smart Alec's"). As she testified at the trial in  
22 the bankruptcy court in an objection to discharge proceeding,  
23 *Triano v. Popov*, A.P. No. 05-3485 (the "Triano AP"), Dodson  
24 purchased, under a share purchase agreement dated April 18, 2004  
25  
26 purchased, under a share purchase agreement dated April 18, 2004  
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1 (the "Share Purchase Agreement"), for a price of \$12,500,  
 2 Debtor's residual interest in 3,744,000 Smart Alec's shares (the  
 3 "Shares"), which were, as of April 2004, pledged to YKF as  
 4 security for hundreds of thousands of dollars of indebtedness.

5       The Share Purchase Agreement is attached as Exhibit 3 to the  
 6 Complaint. YKF filed in the bankruptcy court a motion to dismiss  
 7 the Counterclaim, and attached as Exhibit 1 to that motion a copy  
 8 of a confidential settlement agreement and release among YKF,  
 9 Smart Alec's, Debtor and Dodson dated February 6, 2004 (the  
 10 "Settlement Agreement") settling an Alameda County Superior Court  
 11 suit brought by YKF against Smart Alec's, Dodson and Debtor, No  
 12 2002-061123 (the "YKF State Court Action"); at page 2, paragraph  
 13 2.b, of that agreement, Debtor agreed to pledge the Shares to  
 14 YKF. Thus, at the time of the transfer that is the subject of its  
 15 Complaint, which YKF alleges was intended to hinder, delay or  
 16 defraud creditors, YKF had physical possession of the Shares.

17       Martin F. Triano ("Triano"), the plaintiff in the Triano AP,  
 18 has sued Dodson (and Smart Alec's) in a new Alameda County  
 19 Superior Court, in *Triano v. Dodson, et al.*, No. RG-07-322877  
 20 (the "Alameda SCT Action"), alleging that he, Triano, has a first  
 21 lien on the Shares. Triano also seeks to intervene in this  
 22 proceeding, contending that because ownership of the Shares is  
 23 being litigated herein, he has an interest, as a lien claimaint,  
 24 in protecting himself.

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In the Counterclaim, Dodson alleges that, in delaying Dodson's final payoff of the balance of indebtedness to YKF (the same \$775,000 indebtedness, secured by the Shares and assets of Smart Alec's, that is the subject of the Settlement Agreement), YKF extracted from Dodson the sum of approximately \$90,000 in increased fees and charges by delaying, in bad faith, the payoff.

YKF, after its final extraction from Dodson under the Settlement Agreement, came to the bankruptcy trustee in the underlying Chapter 7 case herein and acquired, for \$30,000, the bankruptcy estate's avoidance rights.

## ARGUMENT

This case poses a curiosity: an adversary proceeding brought in the bankruptcy court by a plaintiff alleging a fraudulent conveyance, in which the plaintiff is neither a bankruptcy trustee nor bankruptcy debtor nor is it a creditor of the bankruptcy estate. Moreover, the defendant is neither a debtor nor a creditor of the bankruptcy estate. In fact, only Triano has a stake in the bankruptcy case, because he is a creditor, albeit a disputed one.

A. This Court should abstain from hearing this proceeding.

A bankruptcy court may abstain from hearing an adversary proceeding "in the interest of justice, or in the interest of comity with state courts or respect for state law." 28 U.S.C. Sec. 1334(c)(1). Among the factors considered by courts in determining whether permissive abstention is appropriate are: the

1 extent to which state issues predominate over bankruptcy issues,  
 2 the presence of a related proceeding commenced in the state  
 3 court, the jurisdictional basis, if any, other than 28 U.S.C.  
 4 Sec. 1334, the degree of relatedness or remoteness of the  
 5 adversary proceeding to the main bankruptcy case, the likelihood  
 6 that commencement of the proceeding in the bankruptcy court  
 7 involves forum shopping, the right to a jury trial, and the  
 8 presence of nondebtor parties. March, Ahart & Tchaikovsky, CAL.  
 9 PRAC. GUIDE: BANKRUPTCY (The Rutter Group 2007), 1:740, p. 1-61-  
 10 62, (citing *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9<sup>th</sup>  
 11 Cir. 1990); *In re Eastport Assocs.*, 935 F.2d 1071, 1075-1076 (9<sup>th</sup>  
 12 Cir. 1991); *In re Lazar*, 200 B.R. 358, 372 (Bkrtcy C.D. Calif.  
 13 1996)).  
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15 In this case, there is neither a debtor nor trustee, and the  
 16 only creditor involved, Triano, is not named in the Complaint.  
 17 The Complaint (and Dodson's Counterclaim) do not impact the  
 18 bankruptcy estate; whether YKF or Dodson wins or loses, there  
 19 will be no more or less money in the bankruptcy estate for  
 20 payments to Alex Popov's creditors. YKF alleges both the  
 21 Bankruptcy Code and the California Code of Civil Procedure  
 22 provisions dealing with alleged fraudulent conveyances, so this  
 23 is not a case in which, on the plaintiff's own terms, only  
 24 federally originated claims are made.  
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26 YKF could have brought this proceeding against Dodson in the  
 27 Alameda County Superior Court; it knows the way, having sued  
 28

1 Dodson and Debtor there previously in the YKF State Court Action.  
 2 The fact that, with the purchase of the bankruptcy trustee's  
 3 rights to assert avoidance actions, YKF sued in the bankruptcy  
 4 court versus returning to the Alameda County Superior Court  
 5 suggests forum shopping on its part. And there is Triano's  
 6 pending Alameda SCT Action against Dodson and Smart Alec's;  
 7 Dodson submits that if the Court were to abstain herein, YKF  
 8 would sue again in the state court. In other words, YKF will not  
 9 be without a forum to adjudicate its claims against Dodson (and  
 10 her claims against YKF).

12 Someone who buys an asset from a bankruptcy estate, in this  
 13 instance a cause of action for an alleged fraudulent conveyance,  
 14 should not have use of the bankruptcy courts to try that action  
 15 where there are other courts of competent jurisdiction. For that  
 16 reason, the Court should abstain.

17       **B. This proceeding should be stayed because YKF has not**  
 18 **qualified to do business in California.**

19       If the Court does not abstain, YKF asks that it stay the  
 20 action because of YKF's incapacity maintain this proceeding  
 21 because it is not qualified to do business in California, and,  
 22 potentially, it may not have capacity to sue under Japanese law.

24       Under California law, a foreign corporation not qualified to  
 25 do business in California may not maintain an action in  
 26 California courts, Corporations Code Section 2203(c). Defendant  
 27 submits that rule should also preclude Plaintiff's maintaining

1 this proceeding. YKF, of course, describes itself as a foreign  
2 corporation with no California presence. The following action's  
3 by YKF, disclosed upon the record of this proceeding, constitute  
4 a California presence

5 (1) investing \$720,000 in California in shares of Smart  
6 Alec's, a California corporation that operates a single  
7 restaurant in on Telegraph Avenue in Berkeley, California; then

8 (2) suing in the Alameda County Superior Court over that  
9 investment through the same attorneys who represent it in this  
10 proceeding; then

11 (3) settling that suit in February 2004 by the Settlement  
12 Agreement, which was (a) entered into in California, secured (b)  
13 by a pledge in California of Smart Alec's shares and (c) by a  
14 UCC-1 filing in Sacramento, California for Smart Alec's assets  
15 and specifying California as the source of law for any disputes;  
16 then

17 (4) entering into a closing agreement with Dodson in March  
18 2007 in California, which is the subject of her Counterclaim,  
19 specifying California law and calling for payment by Dodson to  
20 YKF to the trust account of YKF's attorneys in San Francisco (who  
21 represent YKF herein); then

22 (5) purchasing the avoidance rights sued upon herein from a  
23 bankruptcy trustee in San Francisco, under an agreement entered  
24 into in San Francisco and approved by the bankruptcy court,  
25 sitting in San Francisco; and then

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(6) suing on the avoidance rights in a federal court in San Francisco.

C. The Court should compel YKF to furnish security for costs.

Alternatively, Dodson also seeks an order that YKF, which alleges that it is a Japanese corporation, furnish security for costs. Specifically, YKF should be required to furnish \$25,000 in security, or such other sum as the Court deems reasonable.

This Court has the power to require Plaintiff to post security under the federal courts' power to tax costs. *Anderson v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495, 496 (7<sup>th</sup> Cir. 1993). Federal courts follow the forum state's practice with regard to security for costs. *Simulnet East Assocs. v. Ramada Hotel Operating Co.*, 37 F.3d 573, 574 (9<sup>th</sup> Cir. 1994).

California law provides in CCP Section 1030 that a defendant may file a motion for an order requiring a nonresident or foreign corporation plaintiff to furnish an undertaking for costs and attorney's fees.

Without knowing what discovery will have to be taken and how cooperative YKF will be in bringing witnesses from Japan or North Carolina (where YKF's agent, with whom Dodson was dealing before she paid off the debts to Defendant under the Settlement Agreement, was or is located), Dodson could face significant costs, beyond her attorney's fees, in defending this proceeding. California CCP Sec. 1033(a)(3) includes deposition transcripts

1 and travel expenses to attend depositions as allowable items of  
2 costs. Accordingly, Dodson asks that YKF be made to furnish a  
3 \$25,000 undertaking.

4 Respectfully submitted,

5 Dated: February 29, 2008

THE LAW OFFICE OF JOEL K. BELWAY  
6 Professional Corporation

7 /s/ Joel K. Belway

JOEL K. BELWAY

8 Attorney for Stephanie Dodson

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## **DECLARATION OF SERVICE**

I am over the age of eighteen years and not a party to the within action. On February 29, 2008, I served the attached **Motion of Stephanie Dodson for (1) Abstention, or Alternatively, (2) for a Stay, and (3) for Security for Costs** on the interested parties in this action by placing true copies thereof in sealed envelopes and transmitting said envelopes to the following addresses by the means indicated:

Via First-Class U.S. Mail

James S. Monroe, Esq.  
Gregory E. Schopf, Esq.  
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25 Jessie Street  
16<sup>th</sup> Floor  
San Francisco, CA 94105-2749

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 29, 2007, at San Francisco, California.

\s\ Joel K. Belway